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PAPER AND PAPER PRODUCTS MANUFACTURING EMPLOYEES' UNION v. TRI-WALL (MALAYSIA) SDN BHD

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
AZIAH ALI JCA
B ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-429-02-2012]
9 MARCH 2015

C ***LABOUR LAW:*** *Industrial Court – Award – Trade dispute – Collective agreement – Appeal against decision of High Court in quashing award of Industrial Court – Whether requirements under s. 30(4) Industrial Relations Act 1967 considered – Whether company's financial status taken into account when awarding salary adjustment – Whether salary levels in similar industries considered – Whether Industrial Court committed an error of law*

D ***LABOUR LAW:*** *Employment – Collective agreement – Trade dispute – Whether requirements under s. 30(4) Industrial Relations Act 1967 considered – Whether company's financial status taken into account when awarding salary adjustment – Whether salary levels in similar industries considered – Whether Industrial Court committed an error of law*

E The appellant and the respondent had failed to conclude the first collective agreement ('CA') proposed by the respondent on terms and conditions of employment of the respondent's employees. The issues in dispute were in relation to, *inter alia,* (i) the scope of the CA and some job categories in Appendix A of the CA; and (ii) the salary adjustment and salary structure in Appendix A to the CA. The dispute was then referred to the Industrial Court. In relation to the salary adjustment and the salary structure, the respondent had given a cumulative annual salary adjustment which ranged from 7.5% to 34.2% from 2006 to 2010. The salary adjustments took into consideration the increase in costs of living and the increase in the consumer price index. As such, the respondent proposed that there would be no salary adjustment. The appellant, however, proposed a salary adjustment of 9% of the basic salary. The Industrial Court allowed a salary adjustment of 8% of the basic salary in order to provide job stability for the employees. Further, the Industrial Court also accepted the salary scale proposed by the appellant as it was found to be fair and reasonable. The respondent then filed an application for judicial review in the High Court to quash the award by the Industrial Court. It was argued, *inter alia*, that in awarding the salary adjustment of 8%, the Industrial Court had failed to consider (i) s. 30(4) of the Industrial Relations Act 1967 ('the Act'); and (ii) the respondent's financial status. Allowing the application, the High Court Judge found that the Industrial Court had merely stated the requirements of s. 30(4) without indicating how the principles had been applied. Further, it was held that the Industrial Court did not give consideration to the fact that the respondent

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gave salary adjustments and revisions of between 7.5% and 34.2% before and during the effective period of the CA. Dissatisfied, the appellant appealed to this court.

Held (dismissing appeal with costs)
Per Aziah Ali JCA delivering the judgment of the court:

(1) Section 30(4) of the Act is a statutory safeguard which the Industrial Court is obliged to have regard to in making the award relating to a trade dispute. The mere statement of compliance with s. 30(4) of the Act was insufficient to satisfy the requirements of the provision. Further, in making an award in respect of a trade dispute, the Industrial Court is obliged by law to have regard to (i) the public interest; (ii) the financial implications and the effect of the award on the economy of the country and on the industry concerned; and (iii) the probable effect in related or similar industries. (paras 25, 26 & 32)

(2) In accepting the salary scale as proposed by the appellant and in allowing the salary adjustment of 8%, there was no indication that the Industrial Court had considered the salary levels in related or similar industries, the effect of the award on the industry concerned and the probable effect in related or similar industries, and on the economy of the country. Further, the decision making process was flawed and the award was made without compliance with the relevant and mandatory provision of s. 30(4) of the Act. (paras 31 & 32)

(3) Inferior courts and statutory tribunals and other authorities are not given the jurisdiction to make an error of law and it follows that such error of law, whether on the face of the record or not, in reality goes to jurisdiction. Thus, the Industrial Court had committed an error of law which rendered the whole award invalid. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan responden telah gagal untuk memuktamadkan perjanjian kolektif pertama ('CA') yang dicadang oleh responden berdasarkan terma-terma dan syarat-syarat pekerjaan pekerja-pekerja responden. Isu-isu yang dipertikaikan adalah berkenaan, antara lain, (i) skop CA dan beberapa kategori kerja dalam Appendix A CA; dan (ii) pelarasan gaji. Pertikaian perdagangan itu dirujuk kepada Mahkamah Perusahaan. Bagi pelarasan dan struktur gaji di bawah Appendix A, adalah dihujahkan bahawa responden telahpun memberi pelarasan gaji tahunan kumulatif dari 7.5% kepada 34.2% dari tahun 2006 sehingga 2010. Adalah dihujahkan bahawa pertimbangan yang diambil untuk pelarasan gaji di sini adalah berdasarkan peningkatan kos kehidupan dan harga indeks pengguna. Oleh itu, responden mencadangkan bahawa tiada pelarasan gaji akan dibuat. Perayu, walau bagaimanapun, mencadangkan pelarasan gaji sebanyak 9% dari gaji asas. Mahkamah Perusahaan telah membenarkan pelarasan gaji sebanyak 8% dari gaji asas bagi tujuan memberi kestabilan kerja kepada pekerja-pekerja. Tambahan, Mahkamah Perusahaan

juga telah menerima skala gaji yang dicadangkan oleh perayu sebagai adil dan munasabah. Responden kemudiannya telah memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi untuk membatalkan award Mahkamah Perusahaan. Adalah dihujahkan, antara lain, bahawa dalam mengawardkan pelarasan gaji sebanyak 8%, Mahkamah Perusahaan telah gagal untuk mempertimbangkan (i) s. 30(4) Akta Perhubungan Perusahaan 1967 ('Akta'); dan (ii) status kewangan responden. Membenarkan permohonan tersebut, Hakim Mahkamah Tinggi mendapati bahawa Mahkamah Perusahaan semata-mata menyatakan kehendak s. 30(4) Akta tanpa menunjukkan bagaimana prinsip peruntukan tersebut terpakai. Tambahan, ia juga diputuskan bahawa Mahkamah Perusahaan tidak memberi pertimbangan kepada fakta bahawa responden telah memberi pelarasan gaji dan semakan di antara 7.5% dan 34.2% sebelum dan semasa tempoh pelaksanaan CA. Tidak berpuas hati, perayu merayu ke mahkamah ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 30(4) Akta merupakan suatu perlindungan berkanun yang perlu diambilkira oleh Mahkamah Perusahaan semasa membuat award berkenaan pertikaian perdagangan. Kenyataan semata-mata berkenaan pematuhan s. 30(4) Akta adalah tidak mencukupi untuk memenuhi kehendak peruntukan tersebut. Tambahan, dalam membuat award berkenaan pertikaian perdagangan, Mahkamah Perusahaan mempunyai tanggungjawab di bawah undang-undang untuk mengambilkira (i) kepentingan awam; (ii) implikasi-implikasi kewangan dan kesan award tersebut ke atas ekonomi negara dan industri yang berkenaan; dan (iii) kesan serta kemungkinan kepada industri yang berkaitan.

(2) Dalam menerima skala gaji seperti dicadangkan oleh perayu dan membenarkan pelarasan gaji sebanyak 8%, tiada petunjuk bahawa Mahkamah Perusahaan telah mempertimbangkan peringkat gaji dalam industri-industri yang berkaitan, kesan award terhadap industri berkenaan dan kesan kemungkinan kepada industri yang berkaitan, dan terhadap ekonomi negara. Tambahan, proses membuat keputusan adalah cacat dan award tersebut dibuat tanpa pematuhan peruntukan mandatori s. 30(4) Akta.

(3) Mahkamah rendah dan tribunal berkanun dan pihak berkuasa lain tidak diberi bidang kuasa untuk membuat kesilapan undang-undang dan ianya mengikut bahawa kesilapan undang-undang sedemikian, sama ada atas permukaan rekod atau sebaliknya, pada hakikatnya menyentuh bidang kuasa. Oleh itu, Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang menyebabkan keseluruhan award sebagai tidak sah.

Case(s) referred to:

Arab-Malaysian Development Berhad v. Perak Textile & Garments Manufacturing Employees Union [1987] 1 ILR 118 ***(refd)***

Baxter Healthcare SA (Malaysia Operations) (Pulau Pinang) v. Kesatuan Pekerja-Pekerja Baxter Healthcare SA (Malaysia Operations) [1995] 2 ILR 534 ***(refd)***

Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1998] 1 LNS 354 HC ***(refd)***
Malayan Commercial Banks Association v. National Union of Bank Employees [1982] 1 ILR 246 ***(refd)***
Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53 HC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:
Employment Act 1955, s. 60(3)(b)
Industrial Relations Act 1967, ss. 26(2), 30(4)

For the appellant - Thiru Mangai Krishnan; M/s Surendran & Thiru
For the respondent - A Ramadass; M/s Ramadass & Assocs

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-115-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Aziah Ali JCA:

[1] The appellant, Paper and Paper Products Manufacturing Employees' Union and the respondent Tri-Wall (Malaysia) Sdn Bhd, had failed to conclude the first collective agreement ("CA") proposed by the respondent on terms and conditions of employment of the respondent's employees who came under the scope of representation of the appellant. The effective date of the CA was from 1 July 2007 to 30 June 2010.

[2] The Honourable Minister then referred the trade dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act 1967 ("the Act"). The reference culminated in the Award No. 444 of 2011 ("the Award").

[3] Dissatisfied with the Award, the respondent then filed an application to the High Court for judicial review for an order of *certiorari* to quash the Award.

[4] The High Court allowed the application with costs, hence this appeal. We had dismissed the appeal. The deposit was awarded as costs to the respondent. We now give our reasons below.

Background Facts

[5] At the Industrial Court, the parties had agreed to 32 Articles but five articles were in dispute namely:

(a) Article 3 on the scope of the CA and some job categories in Appendix A to the CA;

(b) Article 7 on rest days;

A (c) Article 14 on medical attention;

(d) Article 29 on transport subsidy;

(e) Article 38 on salary adjustment, and

(f) Appendix A to the CA on salary structure.

B

Decision Of The Industrial Court

Article 3 (Scope Of The CA And Some Job Categories In Appendix A To The CA)

[6] The respondent identified four job categories with either managerial, executive or confidential functions that ought to be excluded from the scope C of the CA. The job categories which the respondent identified were Factory Supervisor, Store Supervisor, Purchasing Supervisor and Assistant Supervisor. The appellant had proposed four new job categories/salary groups namely Skilled Operators, Senior Skilled Operators, Office Boy and Office Cleaner.

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[7] The Industrial Court rejected the appellant's proposal because it was of the view that it was the prerogative of the management to decide on job categories/salary groups. However the Industrial Court deleted some of the job categories and added some job categories in the salary scale proposed by the appellant to conform with that proposed by the respondent.

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Article 7 (Rest Days)

[8] The Industrial Court accepted the respondent's proposal on rest days which the Industrial Court finds are similar to the provisions in s. 60(3)(b) of the Employment Act 1955.

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Article 14 (Medical Attention)

[9] The Industrial Court accepted the respondent's proposal on medical attention with some amendments. The Industrial Court also increased the limit of medical coverage for employees who had not been hospitalised to G RM2,000 per employee per year.

Article 29 (Transport Subsidy)

[10] The respondent had proposed an increase of transport subsidy for employees who were not provided transport from RM40 per month to RM50. The appellant on the other hand proposed an increase to RM100. The H Industrial Court allowed an increase to RM80 per month.

Article 38 (Salary Adjustment And The Salary Structure In Appendix A To The CA)

I **[11]** From 2006 to 2010 the respondent had given a cumulative annual salary adjustment which ranged from 7.5% to 34.2%. The cumulative increase in the consumer price index from 2007 to 2009 was 7.5%. The salary adjustments took into consideration the increase in costs of living and the increase in the consumer price index. The respondent therefore proposed

no salary adjustment. The appellant had proposed a salary adjustment of 9% of the basic salary. The Industrial Court allowed a salary adjustment of 8% of the basic salary as at 30 June 2007 in order to provide job stability for employees.

[12] The respondent followed the 'Hays competency benefit system' ("the Hays system") in respect of the appraisal of the employees' performance. The Hays system requires assessors to undergo training. However none of the assessors except for COW1 has had any training.

[13] According to the Hays system, 70% of the points were given for performance and 30% for attendance. The average appraisal rating was taken from four appraisal ratings. Deductions will be made from the appraisal rating if an employee takes more than two days of medical leave or unpaid leave in the particular year.

[14] The respondent's employees were paid attendance allowance of RM50. If an employee took two days of medical leave, RM25 would be deducted from the allowance. If the employee took unpaid leave, a further RM25 would be deducted. No deduction would be made for hospitalisation. The Industrial Court found this practice to be unfair on the basis that the employee would be penalised twice.

[15] The Industrial Court found that the salary system practised by the respondent does not reflect a fair value for the work the employees are doing. The Industrial Court is of the view that if the respondent intends to implement a salary/wage system linked to performance, the best system would be the 'Productivity Linked Wage System' ('PLWS') where there is consultation with the union on the criteria for the assessment of the employees' performance and the formula for ascertaining the profitability of the company. There is a fixed component and a variable component for annual increments in salary and bonus.

[16] The respondent had proposed a salary scale with a minimum and maximum salary for each group/job category but no fixed annual increment. The annual increments were given based on an employee's last drawn salary as at 31 March of each year and on his/her performance in the previous year. The appellant had proposed a salary scale with a minimum and maximum salary and fixed annual increment.

[17] The Industrial Court accepted the salary scale proposed by appellant which it found to be fair and reasonable after having considered the increase in the consumer price index for the period prior to the commencement date of the CA and the respondent's financial capacity to pay.

[18] The Industrial Court awarded annual increments on 1 April of each year to all confirmed employees but employees with less than 12 months of continuous service as at 30 March will be paid annual

A increments on a *pro-rata* basis. With regard to employees who are earning the maximum salary or more than the maximum salary in his salary group, the Industrial Court had decided that these employees will continue to draw that salary on a personal to holder basis.

B **[19]** The respondent was also ordered to pay a one lump sum *ex gratia* payment of RM1,000 to each confirmed employee covered by the CA.

[20] The job categories/salary groups and salary scale as determined by the Industrial Court can be found at pp. 460-461 of the appeal record.

[21] Before the High Court, the respondent's contentions are essentially as C follows:

(a) that in awarding a salary adjustment of 8%, the Industrial Court had failed to consider:

(i) s. 30(4) of the Industrial Relations Act 1967 ("the Act");

D (ii) established "wage-fixation principles";

(iii) that the respondent had given salary adjustments and salary revisions of between 7.5% and 34.2% before the effective date of the CA.

(b) that in determining the new salary scales, the Industrial Court has failed E to consider that the respondent had its own salary scheme, and the salary scale with minimum and maximum salary and a fixed annual increment is based on performance and not seniority;

(c) that in awarding salary increment on a personal to holder basis to employees who have reached the maximum salary scale, the Industrial F Court has failed to consider the established principle in labour law, which is, that there is a maximum rate of pay for any job;

(d) that the Industrial Court has failed to consider that *ex gratia* payment and transport subsidy are not subject matters of a trade dispute;

G (e) that the Industrial Court has failed to consider that annual increment, if due, will only be paid after completion of 12 months of service and that there is no requirement to pay annual increment on a prorate basis for confirmed employees who have less than 12 months of continuous service;

(f) that in awarding the salary adjustments and increments and increases in H other benefits and the new benefits, the Industrial Court has failed to consider the respondent's financial status and the principle in labour law that an employer has a legitimate expectation to make reasonable profit; and

(g) the Industrial Court has failed to decide whether the respondent had the I financial capacity to face the increase in costs arising out of the Award.

Decision Of The High Court

[22] Briefly, the High Court Judge found as follows:

(a) that the Industrial Court had merely stated the requirements of s. 30(4) without indicating how the principles had been applied;

(b) that no comparison was made in relation to wages and terms and conditions of employment in other companies in a similar industry, and the effect of the Award on the respondent or the industry concerned within the same industry had also not been shown (*Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1998] 1 LNS 354; [1999] 3 MLJ 347; *Arab-Malaysian Development Berhad v. Perak Textile & Garments Manufacturing Employees Union* [1987] 1 ILR 118);

(c) that in awarding the 8% salary adjustment, the Industrial Court did not give consideration to the fact that the respondent had given salary adjustments and revisions of between 7.5% and 34.2% before and during the effective period of the CA (*Baxter Healthcare SA (Malaysia Operations) (Pulau Pinang) v. Kesatuan Pekerja-Pekerja Baxter Healthcare SA (Malaysia Operations)* [1995] 2 ILR 534);

(d) that the Industrial Court had also not given any rationale for giving the 8% salary adjustment;

(e) that the 8% salary adjustment is contrary to wage fixation principles because this being the first CA, the issue of increase in cost of living during the period of a previous CA does not arise;

(f) that the Industrial Court has committed a jurisdictional error as there is no legal basis for allowing an employee who is drawing the maximum salary or more than the maximum salary in his salary group to continue to draw that salary on a personal to holder basis. It is also inconsistent with industrial law principle of maximum rate for the job and is therefore a contravention of established wage fixation principle. The granting of annual increments on a personal to holder basis is only at the discretion of the employer;

(g) that the Industrial Court had failed to give due consideration to the Hays system. The Industrial Court had given undue emphasis on the deduction made on the 30% attendance incentive when 70% of the appraisal is on work performance which required ten criteria to be fulfilled. The High Court is of the view that deductions made for non-attendance is fair practice because payment of such incentive is at the discretion of the employer.

Our Decision

[23] The High Court found that the Industrial Court has failed to give effect to s. 30(4) of the Act. At p. 7 of the grounds of judgment, the High Court Judge states as follows:

> [9] In relation to this principle an examination of the award shows that at page 17, the Industrial Court states as below:
>
> > The Court took into consideration public interest, the financial implications and the effect of the award on the economy of the country and on the industry concerned and also the probable effect on similar industries as provided by section 30(4) of the said Act.
>
> [10] Beside these mere statement the award does not seems to indicate how this principle has been given effect to by the Industrial Court.

[24] The learned counsel for the appellant submitted that the Chairman of the Industrial Court had clearly stated that she had taken into account s. 30(4) of the Act. Section 30(4) provides as follows:

> 30.(4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

[25] In the case of *Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998] 2 CLJ Supp 53; [1998] 2 BLJ 53, Nik Hashim J states amongst others that:

> Section 30(4) is mandatory in its terms by reason of the words '... the Court shall have regard to ...' in the section and hence obligatory. Accordingly therefore, strict compliance of its provision is called for and thus, failure to adhere to its provision renders the impugned award erroneous in law.

Thus in making an award in respect of a trade dispute, the Industrial Court is obliged by law to have regard to:

(a) the public interest;

(b) the financial implications and the effect of the award on the economy of the country, and on the industry concerned; and

(c) the probable effect in related or similar industries.

[26] The strict compliance of s. 30(4) was emphasised by Nik Hashim J in the case of *Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1998] 1 LNS 354 as follows:

> While it is true that the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form (s. 30(5)), the Industrial Court nevertheless cannot disregard the provision of s. 30(4) in its decision in this case. The section is a statutory safeguard which the Industrial Court is obliged to

have regard to in making the award relating to a trade dispute. Thus, in order to make the award respecting the impugned arts. 8, 18, 41(a), and (b) and the Appendix 1 valid under the Act, the Industrial Court must make clear in its decision that the three elements in the section have been considered and make its findings accordingly.

[27] We have perused the Award and we find that, in respect of the salary scale, the Industrial Court had stated that:

> The salary scale which has been proposed by the union was fair and reasonable ... The court took into consideration the financial position of the company and found that it was in a position to pay the salaries under the proposed salary scale by the union. The court also took into consideration the increase in the consumer price index for the period prior to the date of commencement of the collective agreement on 1 July 2007.
>
> The court took into consideration the financial position of the company and found that it was in a position to pay the salaries under the proposed salary scale by the union. The court also took into consideration the increase in the consumer price index for the period prior to the date of commencement of the collective agreement on 1 July 2007.

[28] With regard to salary adjustment, this is what the Industrial Court said:

> The representative of the company submitted that there be no salary adjustment. The union proposed there be a salary adjustment of the basic salary by 9%. The court allowed a salary adjustment of 8% of the basic pay of the employees. A salary adjustment will provide job stability for the employees.

[29] The Award concluded as follows:

> The court took into consideration public interest, the financial implications and the effect of the award on the economy of the country and on the industry concerned and also the probable effect on similar industries as provided by section 30(4) of the said Act.

[30] In the case of *Malayan Commercial Banks Association v. National Union of Bank Employees* (January-June 1982, MLLR 246) [1982] 1 ILR 246, which was referred to by Nik Hashim J in his judgment in *Lam Soon (M) Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* (*supra*), Harun J said:

> Salary increases in the private sector, however, are further subject to the employer's ability to pay, the salary levels in related or similar industries and **its effect on the economy of the country as a whole**. (emphasis added)

[31] We find from the Award that, in accepting the salary scale as proposed by the appellant, and in allowing salary adjustment of 8%, there is no indication that the Industrial Court has considered the salary levels in related or similar industries, the effect of the award on the industry concerned and the probable effect in related or similar industries, and on the economy of the country.

[32] We agreed with the learned High Court Judge that the mere statement of compliance with s. 30(4) is insufficient to satisfy the requirements of that provision. We find that the decision-making process is flawed and the Award was made without compliance with the relevant and mandatory provision of s. 30(4). The Industrial Court has committed an error of law which rendered the whole Award invalid.

[33] Inferior courts and statutory tribunals and other authorities are not given the jurisdiction to make an error of law and it follows that such error of law, whether on the face of the record or not, in reality goes to jurisdiction. (per VC George JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748).

[34] We find that the High Court had decided correctly in allowing the application to set aside the whole Award as prayed. For the aforesaid reasons we dismissed the appeal with costs.